HO-CHUNK NATION GAMING COMMISSION

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November 15, 2006

VIA FACSIMILE (202) 632-0045

The Honorable Phil Hogen, Chairman
National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, D.C. 20005

Re: Comments on Class II Definitions, Gaming Standards and Technical Standards. Proposed Regulations set forth in 25 C.F.R. Parts 502, 546 and 547

Dear Chairman Hogen:

On behalf of the Ho-Chunk Nation, the Ho-Chunk Nation ("Nation") Gaming Commission writes in order to comment on the Class II regulations proposed by the National Indian Gaming Commission ("NIGC" or "Commission") at 25 C.F.R. Parts 502, 546 and 547. The NIGC's proposed regulations concern Class II definitions, gaming standards and technical standards.

First, the Nation extends its appreciation for the opportunity to comment on these regulations and for the time you took to meet with members of the Nation on July 17, 2006 in Bloomington, Minnesota. As you know from our prior comments, we are very concerned about the regulations you have proposed for Class II gaming. Of all tribes in Wisconsin, the Nation stands to lose the most if these regulations go into effect. We tried to impart this message to you at our consultation meeting. The same conclusion was reached more recently in one of the economic impact studies requested by the NIGC. Quite honestly, the Nation's Class II gaming facility ("DeJope") in Madison, Wisconsin would have no compliant machines if the NIGC's regulations go into effect. We hope to provide more detailed comments on the economic impact study to you by December 15, 2006 to demonstrate the very real consequences of these regulations.

For the harm that the NIGC will bring to DeJope, but also for the reasons set forth in the following comments, we want to voice the Nation's opposition to the NIGC's proposed regulations. The Commission's effort exceeds the limits of authority granted by Congress in the IGRA, demonstrated by the text of the statute, IGRA's legislative history and the Commission's own perceptions of its authority over the years. Furthermore, the NIGC's regulations run counter to years of judicial precedent, which only serves to place the Commission on unstable ground when these regulations are examined on judicial review. Please accept these general comments and the following observations and concerns.

A. The Proposed Standards Violate the Inherent Sovereignty Retained by Indian tribes in the IGRA and Exceed the Commission's Authority.

The proposed standards go far beyond what is necessary to properly define electronic, computer and other technologic aids to Class II gaming, or to protect the integrity of such games, thereby impermissibly intruding on tribal sovereign decision-making authority that remains unextinguished and undiminished.

Prior to the IGRA, existing law did not provide a clear basis for federal regulations of tribal gaming. In 1987, the Supreme Court, in *Cabazon Band of Mission Indians v. California*, 480 U.S. 202 (1987), affirmed the right of Indian tribes to utilize gaming for governmental purposes on their lands. In fact, the Court concluded that, where state law permitted and regulated gaming under its civil/regulatory laws, Indian tribes could engage in, or license and regulate, such activity free from state jurisdiction or regulation. With this, no agency of the federal government had a clear statutory power to impose its regulations on the conduct of otherwise legal gaming activities by Indian tribes in Indian country. Rather, tribal governments retained this right. Congress would later confirm this in the IGRA's legislative history, Senate Bill 555 (hereafter, "S.555" or "Senate Report"), by declaring that "tribal jurisdiction over Class II gaming has not been previously addressed by Federal statute and thus there has heretofore been no divestment or transfer of such inherent tribal government powers by the Congress." Senate Report No. 100-446, at 11 (1988).

Congress enacted the IGRA on October 17, 1988 after the *Cabazon* decision, in the form of S. 555. The primary purpose of the IGRA was to benefit tribes, whose rights were to be preserved consistent with the rest of IGRA. For example, § 2702(1) states that one purpose of the IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." The secondary purpose was to provide for minimum federal standards under which the tribes could conduct gaming. *See, e.g.*, § 2702(3). This represents, to the extent such standards are allowable, a limitation by Congress of pre-existing sovereign rights. In fact, Congress found that at the time the IGRA was enacted, "Indian tribes *have the exclusive right to regulate* gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming." § 2701(5) (emphasis provided.) The minimum federal standards intended by Congress are those stated in the IGRA. It was through the IGRA that Congress abrogated or limited the rights of tribes to engage in and regulate Class II or Class III gaming acknowledged in the *Cabazon* decision. If the National Indian Gaming Commission has been given the power to regulate Class II gaming in Indian country, the source of that power must be set out in the IGRA.

The NIGC's role in the IGRA was to be primarily one of oversight, to ensure tribes implemented the minimum Federal standards set out in tribal gaming ordinances. *See* 25 U.S.C. 2710(b)(2). The NIGC was given certain other powers related to Class II gaming, such as reviewing and approving management contracts, review of background investigations of certain gaming employees and management entities, establishing fees, issuing notices of violation and assessing civil fines, and granting certificates of self-regulation. The NIGC is also given the authority to "monitor class II gaming conducted on Indians lands." *See* 25 U.S.C. 2706(b)(1). Coupled with the NIGC's authority to monitor is the NIGC's authority, under 25 U.S.C. 2706(b)(10), to

"promulgate such regulations and guidelines as it deems appropriate to implement the provisions of the [IGRA]."

It can be said that the NIGC has a regulatory role with respect to Class II gaming, but the legislative history of the IGRA makes clear that this role does not extend to developing and imposing detailed regulations for Indian gaming in place of tribal government decisions on necessary regulations. If the NIGC is asserting regulatory jurisdiction with the proposed regulations under the authority of §2706(b)(10), any such regulations cannot go beyond monitoring. Instead, the NIGC's role is limited to overseeing the tribes' own regulatory efforts and approving Class II tribal gaming ordinances.

Other than debates in the U.S. Senate and House, Senate Report 555 is the only formal legislative history on IGRA. Very early in S. 555, the primacy of the tribal role in Class II gaming is stated: "S. 555 recognizes the *primary tribal jurisdiction* over bingo and card parlor operations although *oversight* and certain other powers are vested in a federally established National Indian Gaming Commission." Senate Report at 3. The language here sets out clearly the congressional intent that tribes would retain their inherent rights to regulate Class II gaming. The Commission's role was to be primarily one of oversight to see that the tribe implemented the minimum Federal standards set out in its gaming ordinance under § 2710(b)(2). The Commission was given certain other powers in relation to Class II gaming, such as management contract review and approval, establishment of fees and assessment of fines, and granting certificates of self-regulation. Yet, Congress drew a line and emphasized the primary role for tribes: "Class II continues to be within tribal jurisdiction but will be subject to oversight regulation by the National Indian Gaming Commission." Senate report at 7. Quite simply, the proposed regulations intrude upon tribal sovereignty by usurping the role of tribal governments as the primary regulators of tribal gaming under the IGRA (25 U.S.C. 2710(b)(1)).

Statements by congressional leaders at the time of IGRA's enactment also confirm the intention that tribes retained the sovereign right to regulate Class II gaming. Senate Indian Affairs Committee Chairman Inouye, who managed the bill on the Senate floor, clarified the congressional intent with respect to the NIGC's limited regulatory role. He stated: "[T]he committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the *sovereign rights of tribal governments to regulate* activities and enforce laws on Indian lands." Congressional Record, September 15, 1988, p. S24022. (emphasis supplied.)

The Vice-Chairman of the Indian Affairs Committee, Senator Daniel Evans, also evidenced his understanding of the limited scope of the NIGC's role. In discussing the amendment to the Federal criminal code made by Section 23 of S. 555, he noted

> It is my understanding that this language (Section 23 of the IGRA) would, for purposes of Federal law, make applicable to Indian Country all State laws pertaining to licensing, regulation, or prohibition of gambling *except class I and II gambling which will be regulated by a tribe* and class III gambling which will be regulated by a tribal-state compact.

Congressional Record, September 15, 1988, p. S 24025.

Before enactment of the IGRA, no agency of the federal government had a clear statutory power to impose its regulations on conduct of otherwise legal gaming activities by Indian tribes in Indian country. Rather, tribal governments retained this inherent sovereign right. If IGRA had conferred that authority on the NIGC, it would have abrogated that right. However, Congress made clear its understanding that tribal rights not expressly abrogated were not intended to be affected by the legislation. As Senator Evans said, "If tribal rights are not explicitly abrogated in the language of this bill, no such restriction should be construed" and "this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the *Cabazon* decision." Congressional Record, September 15, 1988, p. S24027. Indeed, Chairman Udall repeated the same understanding when he said:

> Mr. Speaker, while this legislation does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. I would expect that the Federal courts, in any litigation arising out of this legislation, would apply the time-honored rule of construction that ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.

Congressional Record, September 26, 1988, p. H 25377.

After the IGRA was enacted, the NIGC's limited role in regulating Class II gaming was confirmed. The first Chairman of the NIGC, Anthony J. Hope, testified on April 20, 1994 before the Senate Committee on Indian Affairs concerning the role of the Federal Government in the regulation of Indian gaming. Chairman Hope's written statement revealed the understanding that the Commission lacked general regulatory authority over Class II gaming:

> "In enacting IGRA, the Congress recognized that different degrees of regulation are required for different forms of gaming. However, it made the regulation of Indian gaming more complicated by dividing regulation among several federal agencies, the tribes, and the many states where Indian gaming is conducted . . . [C]lass II gaming is bingo, bingo related games and certain non-banking card games and is regulated primarily by the tribes with *oversight* by the Commission (emphasis supplied) . . . The primary responsibility for the regulation of Class II gaming falls to the Indian tribes . . . *In Class II, the post-licensing regulation, or the day-to-day operational regulation, is performed by the tribe with oversight by the Commission* (emphasis supplied) . . . *The Commission lacks the authority usually found in a comprehensive independent regulatory agency* (emphasis supplied). For example, the Commission has *no authority* to impose (1) standards for the conduct of Class II games, (2) internal and financial controls, or (3) standards for licensing vendors and suppliers (emphasis supplied)."

Chairman Hope continued by discussing the need for Congress to set minimum standards for Class II and III gaming. He made it clear that the IGRA did not vest in the Commission the powers it now claims:

> "If Congress is going to impose responsibility on the federal government, however, it must recognize that the logical instrumentality, the NIGC, as presently structured, cannot possibly provide the type and degree of regulation required. Its *powers* and staffing would have to be greatly expanded and restructured (emphasis supplied). . . .

"**Minimum Standards**

The Congress should set minimum standards for the regulation of monitoring of class III gaming, *or authorize the Commission to prescribe them by regulation* (emphasis supplied). In addition to responsibility for initial procedures, such as ordinance and contract review and arranging for background checks, the Commission should be empowered to prescribe rules for the *internal control* (emphasis supplied) over money and chips, extension of credit, security, auditing, and similar functions. If it is given responsibility of regulating class III gaming, it should be empowered to regulate in the same manner as gaming commissions in the states. It should be empowered to enforce standards set by statute or committed to its discretion.

These powers should also be extended to class II operations" (emphasis supplied).

Chairman Hope suggested that Congress should either set minimum standards for regulation of Class II and III gaming, or authorize the NIGC to prescribe such standards by regulation. Why would the Chairman of the NIGC make such a request if the IGRA already authorized the NIGC to impose such regulations? The fact is, the NIGC lacks the regulatory authority to adopt pervasive Class II regulations such as those set forth in proposed parts 502, 546 and 547.

The prior statements of Chairman Hope have been referred to more recently as well. In *Colorado River Indian Tribes v. National Indian Gaming Comm.*, 383 F.Supp.2d 123 (D. D.C., 2005), Chairman Hope's position was construed as the official position of the NIGC regarding its own authority under the IGRA. The Court deferred to his statements that the NIGC lacked authority to regulate Class III gaming. *Id.* at 141. The Court relied on Chairman Hope's statement in its analysis under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under what the District Court referred to as "step one" of the *Chevron* analysis (to determine whether Congress has spoken directly to the precise question at issue in the statute), Chairman Hope's statement was taken as an earlier position bearing on the interpretation of the statute. *Id.* at 142. The Court reasoned that "on that issue, it would blink reality to ignore the fact that even the defendant agency tasked with implementing the statute had earlier taken the view that it lacked the authority to issue the regulations in question." *Id.*

As the NIGC is well aware, the U.S. District Court held that the Class III minimum internal control standards are beyond the statutory authority of the Commission. That decision was upheld on appeal on October 20, 2006 by the U.S. Court of Appeals for the District of Columbia. The Court of Appeals even cited to Chairman Hope's position and found that Congress has never amended the IGRA to confer express power on the Commission to regulate Class III gaming. *See Colorado River Indian Tribes v. National Indian Gaming Comm.*, 2006 WL 2987912 at *3 (C.A. D.C., 2006).

Remarkably, the Commission has not cited to what part of the IGRA provides the authority to issue Class II regulations. In the Background section of proposed Parts 502, 546 and 547, the Commission simply states that "Indian tribes and the NIGC share regulatory authority over Class II gaming." There is no reference to a provision in the IGRA, not even to §2706(b)(10). This should come as no surprise. There is no question that the legislative history provides only a limited, oversight role for the NIGC in Class II gaming. The *Colorado River Indian River Tribes* case demonstrates that this legislative history must be considered when interpreting the IGRA. To do otherwise would be to "blink reality" and ignore the NIGC's prior position.

B. The Proposed Regulations Violate IGRA and Binding Judicial Precedent with which the NIGC must comply.

Even if one assumes the NIGC has a role in issuing Class II definition regulations, the proposed regulations are flawed. The Commission's proposed standards arbitrarily limit the games and technology that Congress has authorized for play on Indian lands as Class II gaming. In light of IGRA's legislative history, the purported areas of ambiguity on which the NIGC has apparently based its intention to adopt the proposed standards simply do not exist.

Certainly, the NIGC's prior regulatory attempt in 1992 to clarify the distinctions between Class II technologic aids and electromechanical facsimiles was not effective. For example, three U.S. Courts of Appeal ignored the Commission's definitions, and one in particular criticized the NIGC for its lack of guidance on the issue. See *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 369 (D.C. Cir. 2000) ("Boiled down to their essence, the regulations tell us little more than that a class II aid is something that is not a class III facsimile."); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542 (9th Cir. 1994) (resorting to dictionary definition of facsimile as "an exact and detailed copy of something," rather than using the NIGC's definition); and *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994) (holding that the scope of gaming determination at issue in the case could be made by looking to the statute alone and without examining the NIGC's regulatory definitions).

In response, the NIGC ultimately revised its Class II definitions in 2002 by codifying the distinctions established by the courts and ten years of experience with the definitions. *See* 67 Fed. Reg. 41,166 (June 17, 2002), codified as 25 C.F.R. Part 502. The NIGC now defines ***technologic aid*** as:

> (a) Electronic, computer or other technologic aid means any machine or device that:
> (1) Assists a player or the playing of a game;
> (2) Is not an electronic or electromechanical facsimile; and
> (3) Is operated in accordance with applicable Federal communications law.
>
> (b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:
>
> (1) Broaden the participation levels in a common game;
> (2) Facilitate communication between and among gaming sites; or
> (3) Allow a player to play a game with or against other players rather than with or against a machine.
>
> (c) Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.

See 25 C.F.R. Part 502.7 (2004).

The Commission's 2002 Class II regulations also define an ***electronic or electromechanical facsimile*** as:

> "[A] game played in an electronic or electromechanical format that replicates a game or chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine."

See 25 C.F.R. Part 502.8.

The 2002 regulations also changed the definition of ***other games similar to bingo***, which now reads:

> "Other games similar to bingo means any game played in the same location as bingo (as defined in 25 USC 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.

See 25 C.F.R. Part 502.9.

Unlike the Commission's 1992 regulatory effort, the courts have treated the NIGC's 2002 Class II regulations favorably. Two U.S. Courts of Appeal have examined the reasonableness of the NIGC's 2002 Class II definitions and, in both cases, deferred to the actions of the Commission under the *Chevron* standard of judicial review. For example, in *United States v. Santee Sioux Tribe*, 324 F.3d 607, 615 (8th Cir. 2003), *cert. denied*, March 1, 2004, the court noted that the NIGC's definitions were amended in 2002 to "conform with the reasoning in the four cases that analyzed this issue prior to promulgation of the amended regulation". Also, in *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1039 (10th Cir. 2003), *cert. denied*, March 1, 2004, the court found that "[a]t least six factors support the reasonableness of the NIGC's construction as consistent with IGRA." Thus, the Commission's 2002 definitional regulations have withstood judicial scrutiny. Thus, there is no need for clarifying regulations that redefine Class II terms.

For example, the NIGC attempts to amend the definition of "facsimile" in 25 CFR 502.8. According to the NIGC, this change is necessary "to make clear that all games including bingo, lotto and 'other games similar to bingo,' when played in an electronic medium, are facsimiles when they incorporate all of the fundamental characteristics of the game." 71 Fed. Reg. 30234. This proposed change fails to recognize that both the legislative history of IGRA and case law indicate that the relevant test for facsimile is not whether the game is played in an electronic format, but whether the electronic format changes the fundamental characteristics of the Class II game by permitting a player to play alone with or against the machine.

While IGRA provides that Class II gaming does not include "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind," 25 U.S.C. 2703(7)(B)(ii), the term "facsimile" is not defined by statute. However, the legislative history suggests that Congress did not intend the facsimile prohibition to restrict the use of electronics to play bingo games. Instead, the term facsimile was used as shorthand for games where, unlike true bingo

games, the player plays only with or against the machine and not with or against other players. As explained in the Senate Report:

> The Committee specifically rejects any inference that tribes should restrict class II games to existing games [sic] sizes, levels of participation, or current technology. *The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and that language regarding technology is designed to provide maximum flexibility.* In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, *linking participant players* at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of *computers and telecommunications technology* as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, *such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles* in which a single participant plays a game with or against a machine rather than with or against other players.

S. Rep. No. 100-446 at 9 (1988) (emphasis supplied).

In other words, the use of technology, even if it allows fundamental characteristics of bingo to be played in an electronic format, does not necessarily make a bingo game a "facsimile." Rather, a bingo game played using technologic aids (which are expressly permitted by 25 U.S.C. 2703(7)(A)(i)), only becomes a facsimile if the technology permits the player to play "with or against a machine rather than with or against other players."

Such an interpretation has been supported by the courts. For example, in *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 724 (10th Cir. 2000), the Court of Appeals explained the applicable test for distinguishing between aids and facsimiles:

> Courts reviewing the legislative history of the Gaming Act [IGRA] have recognized an electronic, computer or technological aid must possess at least two characteristics: (1) the "aid" must operate to broaden the participation levels of participants in a common game, *see Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir. 1992); and (2) the "aid" is distinguishable from a "facsimile" where a single participant plays with or against a machine rather than with or against other players. *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n.*, 304 U.S. App. D.C. 335, 14 F.3d 633, 636-37 (D.C. Cir.), *cert. denied,* 512 U.S. 1221 (1994). Courts have adopted a plain-meaning interpretation of the term "facsimile" and recognized a facsimile of a game is one that replicates the characteristics of the underlying game. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994).

The NIGC also attempts to alter the Class II Classification Standards. The NIGC proposal includes a comprehensive regulatory scheme in a new Part 546 for classifying and certifying Class II "games played with electronic components." Proposed 546.2. The proposed rule contains detailed requirements for such games and a process for approval by an NIGC-approved

testing laboratory and the NIGC. Tribal gaming commissions are permitted to impose additional requirements, but otherwise have no meaningful role in the framework proposed by the NIGC. This is contrary to the IGRA, which specifies that tribes have the primary responsibility to "license and regulate . . . class II gaming on Indian lands within such tribe's jurisdiction . . ." 25 U.S.C. 2710(b)(1).

In addition, the substance of the proposed classification regulation would unlawfully restrict the range of Class II games available to tribes. The proposed rule would restrict tribes to "traditional" bingo and allow only minor variations for games similar to bingo. It also would restrict the types of technologic aids available to tribes for Class II games. For example, the Commission attempts to impose arbitrary limits on the value of the game-winning prize, size of the ball draw, size of the bingo card, the number of releases of bingo numbers, the size of each release, the time period for each release, and the length of each daub period.

Needless to say, the Commission is not on solid ground with its proposed regulations. Even Chairman Hogen previously stated that "[i]t is well settled under the IGRA that Indian tribes are the primary regulators of Class II gaming, 25 U.S.C. § 2710(b)(1), subject only to regulatory oversight by the NIGC." *See* Chairman Phil Hogen Letter to United States Attorney General Alberto Gonzales, dated March 16, 2005, at Pg. 4. Moreover, Chairman Hogen relied on the Senate Indian Affairs Committee Report, 100-446 from 1988, where he said:

> "The report of the Senate Select Committee on Indian Affairs on IGRA itself states this unequivocally:
>
> > S. 555 provides for a system for joint regulation by Tribes and the Federal Government of Class II gaming on Indian lands and a system for compacts between Tribes and States for regulation of Class III gaming. . .
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> "Put slightly differently, it is in recognition of the sovereignty retained by tribes that they are the primary regulators of Class II gaming and that the states have no Class II regulatory role."

See Chairman Hogen Letter, dated March 16, 2005, at Pg. 5.

When the NIGC's proposed regulations are challenged in court, they will be examined in light of the text of the IGRA, the reasonableness or arbitrary quality of the regulations, and the legislative history of the IGRA. The *Colorado River Indian Tribes* case provides a blueprint for questioning the validity of the NIGC's regulations as an aspect of the *Chevron* analysis. No doubt, Chairman Hogen's prior statements may be used as the Commission's understanding of the IGRA. To say that tribes are the primary regulators of Class II gaming, yet impose a set of paternalistic regulations on the tribes, amounts to inconsistent agency action that arguably deprives the Commission of any judicial deference.

An agency must follow established judicial precedent. *See e.g., Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997); *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991). The NIGC's interpretations in the proposed regulations, as written, will be assessed against the settled law. A court's interpretation of a statutory provision trumps an agency's later interpretation that is inconsistent with the court's precedent. *Banker's Trust New York Corp. v. United States*, 225 F.3d 1368 (Fed. Cir. 2000). The agency is not entitled to judicial deference

by the courts if the statute is clear (or its intent is evidenced by the statute's legislative history), or if the agency's interpretation is unreasonable. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Colorado River Indian Tribes v. National Indian Gaming Comm.*, 383 F.Supp.2d 123 (D. D.C., 2005).

Here, the NIGC attempts to define permitted technology by defining the permitted games. Congress defined the games included as Class II gaming under the IGRA and allowed for technology to be used as aids to those games. To the extent that binding judicial precedent exists, the agency must follow that precedent. To the extent the wording of a statute of clear, or is made clear by the legislative intent, as is the case here, that is the end of discussion for the agency. Further, ambiguities in a statute dealing with Indians are to be construed in favor of the tribe. Congress did not delegate authority to the NIGC to adopt legislative or pervasive regulations. The NIGC's proposed regulations are "arbitrary, capricious, and contrary" to the IGRA.

C. The Proposed Regulations Inflict Serious Economic Harm in Contradiction to the Purposes of the IGRA.

The proposed standards include requirements that, to the Nation's understanding, no Class II system currently installed meets. It is not overstatement to say that no existing Class II games would not qualify as such under the NIGC's proposed regulations. For all the diversity of views expressed to the NIGC concerning the proposed regulations, many appear to agree that all existing Class II games would be deemed Class III under the proposed standards of the Commission.

For example, the Class II Tribal Advisory Committee views the NIGC's proposed Class II regulatory scheme as "the creation by the NIGC of a new game that likely has never been played in any bingo hall at any time. Moreover, no electronic bingo game previously approved by the courts or the NIGC would satisfy these requirements." Comments submitted by others make the same observation. *See, e.g.,* Muckleshoot Tribal Council, September 27, 2006 ("If finalized, no electronic games currently classified by the NIGC as class II will survive – they will all become class III games" and "all of the class II games within our facility will either have to be replaced or modified – options that will result in considerable cost to the Tribe."); Nick Farley & Associates comments, October 12, 2006 ("The only issue with the Proposed Standards is that, as written, NFA knows of no Class II Bingo system that currently meets these requirements. This includes systems currently in operation with favorably Advisory Opinions from the NIGC."); and Nova Gaming, LLC comments, October 12, 2006 ("We presently operate close to 4,000 [class II] games and none of these will be compliant.")

Even the economic study requested by the NIGC made the same observation. On November 3, 2006, the Analysis Group submitted a report entitled *The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations*. The report took as a "[g]iven that no existing Class II machines meet the proposed regulation changes" and that "tribes would be required to remove, modify, or replace every Class II machine currently in operation." *See* Analysis Group Study at 13. Based on comments from tribes, casinos, gaming manufacturers and NIGC staff, the Analysis Study found that

there are no Class II gaming machines that would meet the requirements of the proposed regulation changes. Therefore, if the proposed regulation changes go into effect, all existing Class II machines operated by tribes must be modified or replaced (either with compliant Class II machines or available alternatives). And there may be significant capital costs associated with modifying or replacing Class II gaming machines.

See Analysis Group Study at 15.

The Analysis Group study specifically found that the Ho-Chunk Nation DeJope Class II gaming facility would be harmed if the Commission's regulations go into effect. In fact, all of the Class II games operated by Indian tribes in Wisconsin are located at the Nation's DeJope facility in Madison, Wisconsin. *See* Analysis Group Study at 31. This is a purely Class II facility owned and operated by the Nation. It employs approximately one-hundred and ten (110) employees from the local community, including some tribal members. The Analysis Group concluded that "if the NIGC's proposed Class II regulation changes are enacted, the Nation would have no choice but to replace existing Class II machines with compliant devices."

As detailed in other parts of the Analysis Group study, the Nation's DeJope facility would likely suffer the following economic harms: decreased gaming revenue, a decrease in non-gaming revenue, a temporary closure of the facility, an overall decrease in tribal government revenue, an increase in costs (regulatory, capital, financing and revenue-sharing), and a decrease in the number of jobs. Even this understates the impact on the Ho-Chunk Nation. In light of the fact that the local community voted against allowing Class III gaming at DeJope, the Nation's business options for the facility are limited. They would be even narrower if the NIGC's regulations go into effect. DeJope cannot continue to operate and generate revenue at this time if there is no Class II gaming. Assuming the Analysis Group study is correct (that no existing Class II machine is compliant), DeJope would have to close its operations until a new, compliant Class II game can be developed, ordered, delivered, installed, and placed into operation. This could keep the DeJope facility closed for up to one year. This translates into lost revenues, lost jobs, lower per capita payments to tribal members, and a decrease in tribal government revenues. Add to this the harm to the Nation's reputation in the Madison community, and the impact could be devastating.

Viewing the impact of the NIGC's proposed regulations in this context, it is hard to find the Commission's effort consistent with the congressional purposes of IGRA or Federal Indian policy. In the IGRA, Congress specifically found that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." *See* 25 U.S.C. § 2701(4). In addition, one purpose of the IGRA was to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government." *See* § 2702(1). As to the DeJope Class II gaming facility specifically, and the Ho-Chunk Nation generally, the Commission's proposed regulations will *not* promote economic development, self-sufficiency or strong tribal government. Instead, they will have the opposite effect and bring about what many anti-Indian forces in Wisconsin have hoped for.

D. Specific Regulatory Comments, Concerns and Questions.

Members of the Ho-Chunk Nation Gaming Commission and staff independently reviewed the NIGC's proposed regulations and found many of the provisions to be ambiguous, conflicting, and less than helpful.

The NIGC has continued to state that the proposed regulations are necessary to ensure that Class II gaming can be distinguished from Class III gaming. The basic distinction between Class II and Class III gaming is actually quite simple. Class III gaming provides a venue for a player to play against a gaming machine with an infinite set of possible random outcomes, while Class II gaming machines provides a bingo venue for a player to play against other players with a finite set of possible random outcomes. The litmus test for identifying Class II gaming should be simply stated so that advances in technology will never be inhibited by obsolete technical standards. We respectfully recommend that the technical standards be published in bulletin form, which would allow the NIGC to accommodate new technological advances.

Additionally, specific areas of the proposed regulation conflicts with the game commonly known as bingo. For example, the provisions in the latest draft concerning the consequences of "sleeping" – the draft prohibits a bingo player from "catching-up" on any number slept that contributes to either an interim, progressive, or consolation prize. Moreover, slept numbers that eventually contribute to the game-winning pattern may only be "caught-up" where that player is the first to cover all other numbers comprising that pattern. This contradicts the game commonly know as bingo where the player may "catch-up" at any time before the prize associated with that number is awarded, whether that number was eventually needed to complete the game winning pattern rather than some other pattern is entirely irrelevant. Additionally, these limitations are unsupported by anything within IGRA. These provisions serve only to make it difficult to play the game and arbitrarily restrict the play of bingo.

We further believe that the NIGC is opening itself and Tribal entities up to charges of unfair competition. The proposed regulations state "The testing laboratory will demonstrate its relevant technical skill and capability by providing evidence of suitable testing previously conducted for state or tribal regulatory authorities." With the inclusion of this statement, the NIGC is essentially assuring a monopoly for one or two testing laboratories. Also, only a handful of companies are currently offering Class II gaming machines. The uncertainty involved in the certification process, coupled with the additional costs of compliance, might exclude smaller companies from the opportunity to compete. While the NIGC might be willing to take this risk, we believe it is unfair that the Tribes, whom are granted no input or control over the qualified laboratories under these regulations, are asked to assume a disproportionate share of the risk.

Currently, the Ho-Chunk Nation Gaming Commission regulates the Nation's Class III gaming machines, with oversight provided by the State of Wisconsin's Office of Indian Gaming. Our gaming compact provides for independent laboratory testing to ensure that all Class III games meet specific standards. The independent laboratory, which is currently Gaming Laboratory International, has been negotiated and agreed upon by the State and the Tribe, and either party may request that the independent laboratory be changed by mutual agreement. Due to the nature of their agreement, both the State and the Nation work together to ensure that all Class III gaming machines maintain the highest standards. The laboratory is merely a tool to assist us in this endeavor.

However, if the NIGC's proposed regulations go into effect, the NIGC and the laboratory would become the driving force for all future Class II certifications, with the Tribes as a mere tool of enforcement, since all Tribal gaming regulatory authorities are bound to monitor compliance with the regulations. By granting the ultimate final authority to determine whether a machine is classified as a Class II gaming machine to the Chairman, or designee, the regulatory process is no longer a process that involves the entire tribal system, but has become a process dependent upon the will of a single person. Further, the proposed regulation makes no guarantees that the chairman will be qualified, or have qualified advisors, to make these highly technical decisions.

The proposed regulation(s) for the Chairman to object to a certification does not afford the requesting parties their due process. The proposed regulation states that the objection must be raised within 60 days, but the Chairman is not precluded from raising an objection after 60 days with a show of good cause. Additionally, the proposed regulation does not require the Chairman to submit the objection in writing, outlining specific reasons for the objection. This process holds the requesting parties hostage to the procedures. There is no guarantee that even if the tribe waits until the 60 day objection time period has passed, to put a Class II game on the floor, that the Chairman will not object at a later date, thus creating a hardship to the Nation.

In addition, we object to the provisions in proposed 25 CFR Part 546.10, which place heavy burdens on an Indian tribe or tribal gaming regulatory authority. The costs of certification will fall on the tribe, with no requirement for vendors to absorb any costs after certification. Should this be approved as a final rule, Tribes will effectively be required to relinquish their regulatory powers concerning Class II gaming machines, while still bearing the entire burden of monitoring compliance. In our view, this turns the intended framework of the IGRA on its head. Under 25 U.S.C. 2710(a)(2) Class II gaming on Indian lands lies within the jurisdiction of Indian tribes. Moreover, 25 U.S.C. 2710(b)(1) vests the power to regulate and license Class II gaming with tribes. In contrast, the NIGC is given the authority to "monitor class II gaming conducted on Indians lands." *See* 25 U.S.C. 2706(b)(1). Coupled with the NIGC's authority to monitor is the NIGC's authority, under 25 U.S.C. 2706(b)(10), to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of the [IGRA]." If the NIGC's proposed rules go into effect, it appears that tribes will take on a monitoring role, while the NIGC takes on a regulatory and licensing role. Thus, we object to this proposal.

Another concern about the proposed regulations for Part 546 has to do with 546.10(c), requiring the Tribal gaming regulatory authority to affix a seal or other label on each server and each individual client machine. Apart from being an overly intrusive regulation where the Tribe is to have primary jurisdiction, it also serves no practical purpose. In our experience, all Class II machine cabinets have a Tribal identification numbers affixed.

With respect to Part 546.10(d), we are also concerned with the requirement that the Tribal gaming regulatory authority maintain a listing of each server, each machine, and each game program. Based on the manner in which the Ho-Chunk Nation self-regulates is Class II gaming, this would pose a conflict, since the Gaming Commission performs internal audits on these files. While the regulations attempts to broadly confer all responsibility upon the Tribal gaming regulatory authority, this function is better suited to facility management, with oversight and audits accomplished by the tribal gaming commission auditors.

In closing, the Ho-Chunk Nation Gaming Commission understands the difficultly in developing effective minimum internal control standards. The NIGC has taken on a huge task in attempting

to provide distinct clarification between Class II and Class III gaming. However, we strongly believe that if these regulations are put into effect, they will halt Class II gaming as it currently is played. We ask that the Commission take the comments that have been submitted into careful consideration and re-evaluate the implementation of these standards.

Respectfully,

Sharon Whitebear

Sharon Whitebear, Chairperson
Ho-Chunk Nation Gaming Commission

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File-NOV036 Class II Comments v.5